

Pursuant to Ind. Appellate Rule 65(D),
this Memorandum Decision shall not be
regarded as precedent or cited before any
court except for the purpose of
establishing the defense of res judicata,
collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

MICHAEL C. BORSCHEL
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

SHAUN MATTHEWS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0610-CR-882
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Jane Magnus-Stinson, Judge
Cause No. 49G06-0507-MR-116947

May 15, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Shaun Matthews¹ appeals the sentence imposed by the trial court after he pleaded guilty to reckless homicide, a class C felony.

We affirm.

ISSUES

1. Whether the trial court abused its discretion and committed fundamental error when it referred to evidence not in the record.
2. Whether the eight-year sentence imposed for reckless homicide is inappropriate.

FACTS

On July 7, 2005, Christopher Bridges was shot and killed on the grounds of the Newport Apartments. On July 14, 2005, the State charged Matthews and co-defendant Percy Bronson with the murder of Bridges. On June 27, 2006, Matthews tendered to the trial court a written plea agreement with the State whereby he would plead guilty to the lesser included offense of reckless homicide, a class C felony, with sentencing to be argued to the trial court.

At the plea hearing, on July 12, 2006, the State asserted that it

would have proved beyond a reasonable doubt that on or about July 7, 2005, deputies with the Marion County Sheriff's Department were dispatched to a person shot in the Newport Townhomes addition in Marion County, Indianapolis, Indiana. When they arrived they learned that an individual, Christopher Bridges, had been shot and taken to the hospital, and they spoke to witnesses. They spoke to Kevin Smith, who indicated that he was in a '91 tan Chevy Caprice, and that the victim, . . . Bridges, was with Bryant Jackson at a Citgo gas station. While there they learned

¹ Some filings in the record reflect the spelling of Matthews' forename as "Shawn."

that the defendant, . . . Matthews, was at the Newport Apartments and that previously that . . . Matthews and . . . Bridges had had some altercations. . . . Bridges then went to the Newport Townhomes addition where he saw the defendant, . . . Matthews. Got out of his vehicle and approached . . . Matthews. . . . Bridges was unarmed. As he approached . . . Matthews, . . . Matthews pulled a firearm and fired two to three shots, striking . . . Bridges, recklessly shooting at or near . . . Bridges, causing his death.

(Tr. 13-14). When the trial court asked Matthews if this was true, he answered, “Yes.”

(Tr. 14). The trial court then accepted Matthew’s plea and found him guilty of reckless homicide, a class C felony.

The trial court held the sentencing hearing on July 27, 2006. The trial court took judicial notice of letters written to Matthews from Percy Bronson -- who was in jail charged with the shooting death of Joshua McAtee and whom Bridges had identified as having fired gunshots at McAtee.² Matthews admitted that Bronson had asked him to ensure that Bridges did not testify against him. Matthews also testified that, on the evening of July 14, 2005, after Bridges had gotten out of his vehicle and approached him, he shot Bridges, who “was not armed” and “didn’t have a shirt on.” (Tr. 30, 44). Matthews further testified that he saw no weapon in Bridges’ hand or tucked in the waist of his pants when he fired “two shots” at Bridges from a distance of “around eight feet.” (Tr. 41). Matthews also admitted that he had lied when he informed the writer of the presentence investigation report (“PSI”) that he had never used marijuana and admitted that he had “a true finding for Possession of Marijuana.” (Tr. 36).

² The trial court having granted Matthews’ request that judicial notice be taken of these letters, but they are not included in his Appendix. The substance of these letters is summarized in the probable cause affidavit as being the solicitation by Bronson of Matthews “to make sure . . . Bridges does not appear to testify at trial.” (App. 18).

The trial court made a lengthy statement from the bench in explaining its imposition of an eight-year sentence. The trial court found as a mitigating circumstance that Bridges had been the initial aggressor and had provoked the incident, but it noted that “a lot of the mitigation” in that regard was reflected in the plea agreement that allowed Matthews to plead to the lesser-included offense of reckless homicide. (Tr. 101). It found no “particular mitigation or aggravation in [his] criminal history.” *Id.* It found that Matthews was a member of a gang but did not expressly state this was an aggravating factor. The trial court specifically found two aggravating circumstances: that Bridges was unarmed when Matthews shot him, using “excessive force” to respond with a gun to a man there for “a fistfight”; and that Matthews had “lied about [his] drug use.” (Tr. 100, 99, 101). The trial court then found “the aggravators outweigh[ed] the mitigators” and sentenced Matthews to an eight-year term for the class C felony of reckless homicide. *Id.*

DECISION

1. Due Process

Matthews argues that the trial court’s sentence is “fundamentally erroneous because the material evidence upon which the trial court based its maximum sentence came from an unnamed witness – wholly outside the record – whom Mr. Matthews had no opportunity to confront or cross-examine under oath on the record.” Matthews’ Br. at

13. He cites to the following statement by the trial court:

There is uncontroverted evidence that Christopher Bridges learned from the one kid, and I’m sorry, I can’t remember his name, that Mr. Matthews was at the Newport Apartments, and he, and he went there looking for him. I also know that he took off his shirt in an effort to communicate, and held up his arms, that was also the testimony, that he was after a fistfight, period,

end of story. And he was only with one other guy. That's also what the evidence was. Other people were there that may have known both of you, but he was with one guy who, by his testimony, stood back, as he said he told Chris, don't go there, don't go there. And that was about the only kid I believed in all that testimony, because even though he was a reluctant witness, he at least had the human decency to break down and cry when he talked about his friend getting shot.

(Tr. 99). Matthews asserts that "these particular facts" are not found in testimony at either the plea or sentencing hearings or in his PSI, and he "had no opportunity to challenge the reliability" of the witness that provided these "material facts." Matthews' Br. at 13, 15. Therefore, he concludes, his sentence is fundamentally erroneous. We cannot agree.

As the State correctly notes, Matthews "made no objection to the court's statement in this regard at the time of sentencing or in any way indicated to the court that he believed the court was improperly relying on knowledge gained during the co-defendant's trial." State's Br. at 5. However, Matthews asserts this matter constitutes fundamental error, thus not requiring an objection.

"The 'fundamental error' exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). Further, in sentencing, a trial court "may not take judicial notice of its own records in another case previously before the court, even on a related subject and with related parties." *Bonds v. State*, 729 N.E.2d 1002, 1006 (Ind. 2000). The initial portion of the quoted statement indicates that Bridges learned of Matthews' presence at the Newport Apartments and went there looking for

him. Such is the inference drawn from the factual basis stated at the plea hearing, and which Matthews admitted to be true. Two subsequent material facts in the statement -- that Bridges' shirt was off and he was unarmed -- were admitted by Matthews in his testimony. Moreover, taken together, the facts contained in the above-quoted statement by the trial court support the conclusion that Bridges was the initial aggressor, and the trial court expressly found this fact to be a mitigating circumstance. Thus, any reference to testimony not in the record in this regard did not pose substantial harm or potential harm to Matthews. *See Mathews*, 849 N.E.2d at 587. Accordingly, he was not denied fundamental due process and there was no fundamental error.

2. Inappropriate Sentence

Although Matthews frames his issue as being that his sentence is inappropriate, he also argues that the trial court erred in its consideration of mitigating and aggravating circumstances. Sentencing lies within the discretion of the trial court. *Patterson v. State*, 846 N.E.2d 723, 727 (Ind. Ct. App. 2006). If a trial court imposes a sentence greater than the advisory sentence, it must explain its reasoning therefor. *Id.* The trial court is not required to find the presence of mitigating circumstances. *Id.* When a defendant offers evidence of mitigators, the trial court has the discretion to determine whether the factors are indeed mitigating, and the trial court is not required to explain why it does not find the proffered factors to be mitigating. *Id.* The trial court's assessment of the proper weight of mitigating and aggravating circumstances is entitled to great deference on appeal and will be set aside only upon a showing of a manifest discretion. *Id.*

Matthews argues that the trial court “found a single aggravating circumstance – the excessive force used by Mr. Matthews in self-defense that resulted in Mr. Bridges’ death,” and “wrongly . . . found only one mitigating circumstance – the fact that Mr. Bridges was the initial aggressor.” Matthews’ Br. at 20. According to Matthews, “the trial court failed to consider” his “youthful age as a mitigating factor” and overlooked other potentially mitigating factors. *Id.* at 22.

First, the trial court expressly found two aggravating circumstances: that Bridges was unarmed, and that Matthews had lied about his criminal history. Second, as to Matthews’ young age, the record suggests that Bridges was approximately the same age. Matthews also claims the trial court should have considered as mitigators his having called police after the shooting, his expression of remorse, his acceptance of responsibility by pleading guilty, and that this was his first adult conviction. However, the trial court has the discretion to determine whether factors are indeed mitigating, and we find no abuse of discretion in its having not found the foregoing to be significant mitigating factors and its assessment of the proper weight for the factors it found. *See Patterson*, 846 N.E.2d at 727.

Matthews also argues that imposition of the maximum sentence³ in his case is inappropriate. We cannot agree.

Pursuant to Indiana Rule of Appellate Procedure 7(B), we “may revise a sentence authorized by statute if, after due consideration of the trial court’s decision,” we find

³ The sentencing range for a class C felony offense is from two to eight years. *See* Ind. Code § 35-50-2-6.

“that the sentence is inappropriate in light of the nature of the offense and the character of the offender.” Our review of sentences must give due consideration to the trial court’s sentence because of the special expertise of the trial bench in making sentencing decisions. *Patterson*, 846 N.E.2d at 731. Nevertheless, Appellate Rule 7(B) does authorize our revision of a sentence when the conditions of the Rule are met. *Id.*

Regarding the nature of the offense, from a distance of approximately eight feet Matthews fired several shots at Bridges, who was unarmed, killing him. Further, based upon his claim of self-defense, Matthews was allowed to plead guilty to the lesser-included offense of reckless homicide rather than face trial for murder. As to his character, the trial court found that Matthews shot and killed an unarmed man; and that Matthews lied about his criminal history. Although it did not assign any weight to it, the trial court further found that Matthews was a member of a gang (which Matthews did not deny or object to), and the PSI reflects that “the Marion County Gang Task Force list[ed] [Matthew]’s name as a member of the 7-1 Gang.” (PSI 5). Finally, Matthews admitted having violated probation. After giving due consideration to the trial court’s decision, we cannot say that Matthews’ sentence is inappropriate.

Affirmed.

BAKER, J., and ROBB, J., concur.